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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JOSEPH PATRICK BILLOCK, Defendant and Appellant.	G042252 (Super. Ct. No. SWF021013) O P I N I O N

Appeal from a judgment of the Superior Court of Riverside County, Albert J. Wojcik, Judge. Affirmed.

Richard Jay Moller for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Lilia E. Garcia and Kristine A. Gutierrez, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Defendant Joseph Patrick Billock challenges his conviction for aggravated sexual assault (rape) on a child. He claims the court wrongly admitted evidence of other sexual acts and limited his argument, the prosecutor committed misconduct during closing argument, and the jury committed misconduct during deliberations. No reversible error appears. We affirm.

FACTS

The Rape

The victim, an eight-year-old girl in foster care, went to live with defendant — an ordained pastor — and his wife for about six weeks starting in September 2005. Defendant would do "nasty stuff" to her. He once went to her bedroom while his wife was in the kitchen. Defendant unzipped his pants, left the room for minute or two, then came back, "pushed [her] on [her] bed and started doing yucky's to [her]." While the victim was on her back, defendant got on top of her "like . . . how you ride a horse," with his legs off to the side. Another time, defendant "flipped over," held her flat on top of him, and asked her "to move fast."

Defendant would do this to the victim several times a week. He would get on top of her, take his "private" and "point it down," and put it "in [her] private." He would "make weird noises, like, hard breathing" and move "fast," "frontwards, backwards, frontwards, backwards." This felt "really weird" and "really nasty, and it didn't feel good at all." Afterwards, the victim would go to the bathroom and see "white stuff coming out of [her] and blood," but there was blood only the first few times. It would "hurt really bad when [she] had to go to the bathroom, or wash, or take a shower." Her private would "itch[] and [hurt[], it would turn red."

After a few weeks, the victim "couldn't take it anymore" and spoke to defendant's wife. The victim told the wife "'Your — Joe is doing nasty stuff to me and I

can't take it.'" The wife replied she did not believe the victim and went back to her housecleaning.

The victim left the defendant's house to live with her aunt and cousins in November 2005. The victim told them about defendant around January 2007, and her aunt took her to the police.

The Trial

The Riverside County District Attorney filed an information charging defendant with two counts of aggravated sexual assault on a child. (Pen. Code, § 269, subd. (a)(1) [rape].) The first trial resulted in a deadlocked jury and a mistrial.

In the second trial, the parties stipulated to admit the victim's testimony from the first trial. This included the victim's acknowledgment that she had seen the R-rated movies "Scream, Halloween, Chuckie[,] [a]nd the Grudge" and that when she was six, she saw "this man was on top of my mom" and she saw their "privates."

The prosecution called expert witnesses. A forensic child abuse interviewer played a videotape of her interview with the victim and testified the victim acted appropriately for a sexually-abused child. A girl the victim's age would not know the mechanics and aftereffects of sexual intercourse unless she had been sexually abused — children do not learn about vaginal bleeding from movies or seeing others have sex. A physician testified sexual assault on a prepubescent girl would leave physical traces after a year in only 5 percent of cases. Sexual assault of prepubescent girls often involves labial coitus, in which the penis does not or only partly penetrates the hymen. This might cause a small amount of bleeding, but not any injury detectable after a year. A psychologist testified sexual abuse is "[v]ery, very rarely . . . done in front of other people." She found nothing unusual about a nine-year-old sexual abuse victim not remembering all of the details about the abuse or waiting a year to tell someone — especially if she had since moved to a new home. A detective testified sexual abuse

exams are most often conducted when the assault is reported within 72 hours, when physical evidence is most likely to remain. He saw no reason to put the victim through an intrusive sexual assault exam in 2007 to check for sexual abuse that occurred in 2005.

Four of defendant's other foster children testified, too. J.T. testified defendant sexually abused her in August 2006, when she was 13. Defendant placed his penis in her hand and moved until he ejaculated. J.T. reported defendant to the police, but conceded lying to them about defendant also touching her bottom. Juliet testified defendant walked around in his underwear and once lured her into a room and blocked the door. She was living with defendant when defendant sexually abused J.T., and saw them right after the incident — J.T. looked "really really scared and uncomfortable." J.T. told her about the abuse the next morning. Brandon testified defendant walked around in an "open robe," "flashing" his penis, which was sometimes erect. Defendant once tried to join him in the shower. Robert testified defendant walked around naked "at least once every other day," "most of the times" with an erection. Defendant watched Robert go to the bathroom and followed him around at night, brushing up against him. Robert once saw defendant masturbate and ejaculate on the living room floor.

The defense called several witnesses. Defendant's wife denied the victim complained about defendant. She never saw any blood or bodily fluids on the victim's sheets or clothing. The wife heard J.T. boast "in a laughing tone" about getting defendant into trouble. She claimed Brandon and Robert masturbated compulsively and used sexually-explicit language. They never complained to her about defendant. And the wife never saw defendant masturbate or walk around naked. A social worker and a therapist noted the victim had imitated sex with a pillow before living with defendant.[1] J.T. and Juliet's social worker testified the girls did not report defendant's sexual abuse to her. The social worker had been concerned J.T. might make false accusations against

[1] The therapist's testimony from the first trial was read into evidence by stipulation.

defendant because J.T. did not like living with him. Two character witnesses testified for defendant, including a pastor. A gynecologist testified vaginal intercourse would "shatter the hymen" of an eight-year-old girl and leave scarring visible "months or years later" in 20 to 40 percent of cases. He conceded labial coitus would not likely leave any injuries visible after a year.

The jury found defendant guilty of one count of aggravated sexual assault (rape) on a child. The court sentenced defendant to 15 years to life in state prison.

DISCUSSION

The Court Permissibly Admitted the Evidence of Defendant's Other Sexual Acts

Defendant contends the court should have excluded the testimony of defendant's other four foster children about his sexual misconduct against them.

"In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by [Evidence Code] Section 1101, if the evidence is not inadmissible pursuant to [Evidence Code] Section 352." (Evid. Code, § 1108, subd. (a).)[2] "[S]ection 1108 implicitly abrogates prior decisions of this court indicating that 'propensity' evidence is per se unduly prejudicial to the defense." (*People v. Falsetta* (1999) 21 Cal.4th 903, 911 (*Falsetta*).)

In determining whether to admit evidence of other sexual acts pursuant to section 352, "trial judges must consider such factors as [the prior sexual offense's] nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden

[2] All further statutory references are to the Evidence Code.

on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense." (*Falsetta*, *supra*, 21 Cal.4th at p. 917.)

The admission of the other-acts evidence was not an abuse of the court's discretion. (See *People v. Ewoldt* (1994) 7 Cal.4th 380, 405 [standard of review].) Each case involved defendant's inappropriate sexual conduct against foster children in his house. He used his body or secluded spaces to confine, brush against, or come uncomfortably close to Juliet, Brandon, and Robert. He exposed his penis to J.T., Brandon, and Robert. He ejaculated using J.T.'s hand and ejaculated in front of Brandon. These acts are sufficiently similar to the charged offense, in which he secluded the victim in her bedroom and rubbed his penis between her labia until he ejaculated. Section 1108 was designed to obviate "'excessive requirements of specific similarity'" and recognize that "'[m]any sex offenders are not 'specialists,' and commit a variety of offenses which differ in specific character.'" (*People v. Soto* (1998) 64 Cal.App.4th 966, 984.) And yet the other acts were sufficiently discrete that the jury would not be confused. They involved different conduct against different victims at different times, but none were very remote in time. The foster children's testimony "was brief and to the point." (*People v. Callahan* (1999) 74 Cal.App.4th 356, 371.) Importantly, "[t]here was not a substantial danger of undue prejudice because the circumstances of the [other] incident[s] were no more inflammatory than the circumstances of the current incident involving" the victim.[3] (*Calahan*, at p. 371.) The most inflammatory conduct was the charged offense — raping an eight-year-old girl.

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[3] The California Supreme Court has already rejected the contentions, raised anew here, that section 1108 and the corresponding jury instruction violate due process. (*Falsetta*, *supra*, 21 Cal.4th at pp. 915, 922 [statute]; *People v. Reliford* (2003) 29 Cal.4th 1007, 1009, 1016 [instruction].)

The Sustained Objections to Defendant's Closing Argument Did Not Violate Due Process

Defendant contends the court violated his due process rights to comment on the evidence by twice sustaining prosecution objections to his closing argument. He contends the objections prevented him from arguing the lack of corroborating physical evidence from a sexual assault examination showed reasonable doubt.

First, the court sustained an objection to defense counsel's statement, "If you think that these things happened to this little girl, the least you can do for that little girl is have her tested for STDs. It's what's done when every adult is raped. That wasn't even done in this case." The court explained, "I don't think we have testimony about that. That's sustained." Defense counsel stated, "We have evidence there were no tests done at all. The court replied, "You're talking about adults." Defense counsel stated, "Okay. Yeah. Okay."

Second, defense counsel told the jury, "So the case is presented again, and the case — they've had seven months since the last trial to do the exam. This isn't a new argument, by the way. They had seven months to think about it." The court sustained an objection, telling the jury "Evidence that's presented to you. Determine the case on what was presented." The court continued, "You have to determine whether or not you're convinced of guilt beyond a reasonable doubt from what? From what? From what's been presented. Not from what's not been presented, but from what's presented."

"A criminal defendant has a well-established constitutional right to have counsel present closing argument to the trier of fact. [Citations.] This right is not unbounded, however; the trial court retains discretion . . . to ensure that argument does not stray unduly from the mark." (*People v. Marshall* (1996) 13 Cal.4th 799, 854-855 (*Marshall*).)

The court did not abuse its discretion or deny defendant due process by sustaining the objections. Defendant was still able to offer evidence and argument to support his "no physical evidence" theory of reasonable doubt. He presented expert

testimony that vaginal intercourse with an eight-year-old girl would "shatter the hymen" and could leave physical signs for months or even a year in up to 40 percent of cases. And defense counsel argued at length about the likely damage to the victim's hymen, the implausibility of the labial coitus theory, and the lack of a sexual- assault examination. In context, the court sustained objections only to defense counsel's statements that (1) sexual assault examinations are performed on every raped adult, and (2) defendant was being retried. These statements introduced facts that were not in evidence and/or irrelevant and thus "stray[ed] unduly from the mark." (*Marshall*, *supra*, 13 Cal.4th at p. 854.) The court permissibly sustained objections to them.

No Reversible Prosecutorial Misconduct Occurred in Closing Argument

Defendant contends the prosecutor committed misconduct throughout closing argument. Defense counsel raised no objections, but we will address the claims to obviate a claim of ineffective assistance. "The applicable federal and state standards regarding prosecutorial misconduct are well established. '"A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.'"' [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves '"'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.'"' [Citations.] . . . [Citations.] Additionally, when the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.)

No reasonable likelihood exits the prosecutor's remarks were so unfair, deceptive, or reprehensible they misled the jury and prejudiced defendant.

The prosecutor did not impermissibly vouch for J.T. by describing her as "an honest witness, nothing to gain, not involved with the Billocks anymore . . . ." He prefaced this remark by stating, "maybe you like [J.T.], maybe you don't. Maybe [J.T.] has some background that disturbs you. That's up [to] you to decide her credibility." He also noted she was "very candid" in conceding laughing about getting defendant in trouble. "Prosecutorial assurances, based on the record, regarding the apparent honesty or reliability of prosecution witnesses, cannot be characterized as improper 'vouching,' which usually involves an attempt to bolster a witness by reference to facts outside the record." (*People v. Medina* (1995) 11 Cal.4th 694, 757, italics omitted.) Noting J.T.'s lack of motivation to fabricate and her prior concession are acceptable "[p]rosecutorial assurances" of honesty, not vouching. (*Ibid.*)

The prosecutor did not commit misconduct by commenting on the jury instruction providing rape victim testimony need not be corroborated. (See CALJIC No. 10.60.) He stated, "Think about why we need a jury instruction like this. How many witnesses are there to an average molest. . . . It happen[s] in secret, as Dr. Ward indicated. It happens behind closed doors. And when only the defendant and the victim are present, there aren't going to be any witnesses. [¶] What do we know also? There's very unlikely to be any forensic evidence in a sexual-assault case. Therefore, if we don't have a jury instruction like this, we won't be able to convict the people that prey on children. [¶] Molesters are opportunists. They occur in secret. There is no[] forensic evidence."

In context, the prosecutor was fairly explaining why no corroboration should be needed for the victim's testimony. His reasoning was consistent with the victim's testimony about being raped in her bedroom, the expert testimony about the typical location and method of sexual abuse, and the expert testimony about the likelihood of physical evidence of the rape. The prosecutor was not improperly arousing the jury's fears about "people that prey on children" or implying he had secret knowledge

defendant preyed on children. A prosecutor's closing "'argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom.'" (*People v. Wharton* (1991) 53 Cal.3d 522, 567 (*Wharton*).)

Nor did the prosecutor appeal to the jury's passions by noting the other-act witnesses were foster children. He stated, "The defense can get up here all day long, tell you why these kids are troubled. I don't disregard that. I think it's important. But why does that help you to explain why these boys would come and testify in this case years later and accuse this man of sexual abuse? Think about how uncomfortable they were. [¶] Abusers focus on troubled kids. Pretty obvious. Why do you think [defendant] focused on these two boys? Could it be more clear? Who is going to believe them? That's what the defense is counting on. You won't believe any of these kids because they are foster kids. [¶] I'll tell you, if we don't prosecute people that abuse foster kids or abused, troubled kids, then we are not going to be able to take predators and take people that hurt children off the streets. The reality is these [kids] are targets, and that's what [defendant] counted on back then. As I told you before, the defense is counting on that now."

In context, the prosecutor was fairly rebutting the defense's attacks on the witnesses' credibility. The defense had called the defendant's wife and a social worker to testify that none of the four foster children had complained about defendant, J.T. had laughingly boasted about getting defendant into trouble, and Brandon and Robert were sexually inappropriate themselves. The prosecutor was not improperly arousing the jury's fears about "predators" and "people that hurt children" or implying he had secret knowledge defendant was such a person. In making "fair comment[s]" on the evidence, a prosecutor may "'"'vigorously argue his case and is not limited to 'Chesterfieldian politeness'" [citation], and he may "use appropriate epithets warranted by the evidence."'" (*Wharton*, *supra*, 53 Cal.3d at p. 567.)

The prosecutor did not improperly rely on facts outside the record by explaining why the victim was not given a sexual assault examination. He stated, "We are not ever going to put a little girl though a physical intrusive sexual-assault exam unless we think it's going to yield useful evidence, either for the prosecution or the defense. And we know that wouldn't happen in this case." "We're not going to put an eight-year-old that's been raped on a table, have a doctor put something inside her and violate her one more time, just because the defense can make that argument at trial. Never do it. And I hope you respect that." These statements were a "fair comment" on the expert testimony and "matters . . . which are common knowledge" — i.e., the intrusiveness of a sexual-assault examination on a prepubescent girl. (*Wharton, supra,* 53 Cal.3d at p. 567.) The prosecutor was not reasonably inviting the jury to consider evidence outside the record with the stray remark about "never" performing sexual examinations.

Finally, the prosecutor did not improperly rely on facts outside the record in arguing defendant raped her by engaging in labial coitus. He stated, "What probably happened here is exactly what Dr. Horowitz testified happened here, which is that the defendant did what most perpetrators do to prepubescent girls, which is . . . he put his penis between the lips of her vagina and rubbed it to the point of ejaculation. . . . [¶] Why? For exactly the same reason that Dr. Sinkhorn testified to, which is basically the defendants know they are going to cause severe damage to a little girl's vagina. They are not stupid. [Defendant] is not stupid. He's going to do it in a way which makes sure that he does not get caught. If he puts his penis all the way through her hymen, into her vaginal cavity, he's going to get caught." These are "fair comment[s]" on, and "reasonable inferences [and] deductions" from, the evidence. (*Wharton, supra*, 53 Cal.3d at p. 567.) The expert witnesses testified labial coitus is common when men sexually abuse young girls, and might cause small amounts of bleeding. The victim testified it felt "weird" and "nasty" when defendant abused her — and hurt afterwards. She also

testified she saw blood coming out of her, but only the first few times defendant abused her. While the victim spoke of defendant placing his "private" in her "private" and "moving fast," she did not describe defendant's conduct in any way that flatly contradicts the theory of labial coitus.

In sum, the prosecutor's closing was not so unfair, deceptive, or reprehensible as to constitute misconduct. (*People v. Samayoa*, *supra*, 15 Cal.4th at p. 841.) Moreover, the jury instructions dispelled any possible prejudice. The court instructed the jury "base your decision on the facts and the law. [¶] . . . you must determine the facts that have been proved from the evidence received in the trial and not from any other source." It continued, "Statements made by the attorneys during the trial are not evidence." We presume the jury followed its instructions. (*People v. Avila* (2006) 38 Cal.4th 491, 574.)

The Court Permissibly Denied the New Trial Motion Asserting Jury Misconduct

Defendant contends the court wrongly denied his motion for a new trial asserting jury misconduct. Defendant supported his motion with a declaration from Juror No. 10, who claimed these events happened during deliberations: (1) Juror No. 1 told the jury he had lied during voir dire about having had a positive experience serving on a deadlocked jury — he wanted to get on this jury because he was a teacher and had a duty to make sure the jury did not hang and let a "child molester" go free, (2) Juror No. 1 told the jury he wanted to cut defendant's "balls off," (3) Juror No. 9 lied during voir dire by not disclosing he knew the pastor who testified as a defense character witness, (4) Juror No. 1 told the jury that "double jeopardy" means a defendant can be tried only twice, (5) Juror No. 6 told the jury she had "labial coitus" with her boyfriend that sometimes led to bleeding and semen "drip[ping] out," (6) Juror No. 11 told the jury her husband's semen would sometimes stick to her and "drip off" later, (7) Juror No. 3 told the jury that the

police can tell if someone is telling the truth by looking at the right side of the person's body, and (8) Juror No. 11 read to the jury a definition of rape taken from the internet.

The court held a hearing on the jury misconduct claim. With counsels' consent, the court initially questioned only Jurors No. 1 and No. 3.

Juror No. 1 did not recall discussing his prior jury service or double jeopardy during deliberations. Double jeopardy may have been discussed after the jury reached a verdict. He recalled someone recently mentioning determining veracity by watching body movements, but it may not have been a juror in this case, and at any rate it was not stated seriously. The jury discussed the court's definition of rape and their personal sexual experiences.

Juror No. 3 did not hear any jurors discuss their prior jury service, lying during voir dire, the term "double jeopardy," or the concept that a defendant could be tried only twice. Another juror wondered how many times a defendant could be tried, and Juror No. 3 replied "endless, I think. I don't know." All of the jurors spent days analyzing the victim's demeanor during the videotaped interview, but no one mentioned any particular technique. Juror No. 3 voted not guilty with Juror No. 10 and two other jurors at first. They felt pressure to change their vote, and did so after the court clarified the extent of penetration required for rape.

The court denied the new trial motion. It found Jurors No. 1 and No. 3 to be "very, very credible, very, very believable" and noted "nothing they said led [the court] to believe they're fabricating." Conversely, the court found Juror No. 10's "credibility is wholly suspect." The court noted "this Juror # [10] had some very, very pointed comments, pointed to the extreme," in an in-chambers conference during deliberations.[4] Juror No. 10's statements were "almost very sarcastic, very biting, very

[4] During deliberations, Juror No. 3, the foreperson, informed the court that Juror No. 10 was introducing outside facts into deliberations. Apparently, J.T. had testified about biting her dentist, and Juror No. 10 mentioned his sister was a dentist who

bitter, almost as if he had an ax to grind. His entire approach to me seemed to be he was very unhappy over something." The court denied defense counsel's request to continue sentencing while counsel conducted research and interviewed the other jurors.

"A juror's receipt or discussion of evidence not submitted at trial constitutes misconduct. [Citation.] Juror misconduct raises a rebuttable presumption of prejudice; a trial court presented with competent evidence of juror misconduct must consider whether the evidence suggests a substantial likelihood that one or more jurors were biased by the misconduct." (*People v. Dykes* (2009) 46 Cal.4th 791, 809 (*Dykes*).)

"The trial court has discretion to determine whether to conduct an evidentiary hearing to resolve factual disputes raised by a claim of juror misconduct. [Citation.] 'Defendant is not, however, entitled to an evidentiary hearing as a matter of right. Such a hearing should be held only when the court concludes an evidentiary hearing is "necessary to resolve material, disputed issues of fact." [Citation.] "The hearing . . . should be held only when the defense has come forward with evidence demonstrating a strong possibility that prejudicial misconduct has occurred. Even upon such a showing, an evidentiary hearing will generally be unnecessary unless the parties' evidence presents a material conflict that can only be resolved at such a hearing." [Citation.]' [Citation.] The trial court's decision whether to conduct an evidentiary hearing on the issue of juror misconduct will be reversed only if the defendant can demonstrate an abuse of discretion." (*Dykes*, *supra*, 46 Cal.4th at pp. 809-810, fn. omitted.)

"The trial court is vested with broad discretion to act upon a motion for new trial. [Citation.] When the motion is based upon juror misconduct, the reviewing court

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had never been bit. A judge — not the trial judge, who was unavailable — spoke with Juror No. 10 in chambers and returned him to the jury to continue deliberating. The court reviewed a transcript of that in-chambers conference in determining Juror No. 10's credibility.

should accept the trial court's factual findings and credibility determinations if they are supported by substantial evidence, but must exercise its independent judgment to determine whether any misconduct was prejudicial." (*Dykes, supra*, 46 Cal.4th at p. 809.)

The court did not abuse its discretion in denying the new trial motion after the hearing. It credited Jurors No. 1 and No. 3, who testified no juror misconduct occurred. And it disbelieved Juror No. 10's declaration, based in part on his "pointed," "sarcastic," "biting," and "bitter" prior comments concerning deliberations. (See *Dykes, supra*, 46 Cal.4th at p. 810 [court determines witness credibility]; see also *People v. Quesada* (1991) 230 Cal.App.3d 525, 533 [court determines credibility of declarations].) The court thus resolved the factual issue of whether any juror misconduct occurred, finding none had. We defer to this factual determination, supported as it is by the credited testimony of Jurors No. 1 and No. 3. No """material, disputed issues of fact""" remained to warrant additional proceedings. (*Dykes, supra*, 46 Cal.4th at p. 809.) Thus, the court permissibly declined to continue sentencing to allow for additional jurors to be interviewed by defense counsel or examined at a further hearing. """[C]ourts are, and should be, hesitant to haul jurors in after they have reached a verdict in order to probe for potential instances of bias, misconduct or extraneous influences."""" (*Dykes*, at p. 809, fn. 23.)

DISPOSITION

The judgment is affirmed.

IKOLA, J.

WE CONCUR:

MOORE, ACTING P. J.

FYBEL, J.